

<sup>1</sup>Judge Mannion has recently been elevated to a United States District Judge within this district.

is inadequate or ineffective to test the legality of his detention. A section 2255 proceeding is not ineffective or inadequate because an individual has been unable to obtain relief under that provision, or because an individual is procedurally barred from filing a § 2255 motion, or that he is unable to meet the stringent gatekeeping requirements of § 2255. *Cradle v. United States ex rel. Miner*, 290 F.3d 536, 539 (3d Cir. 2002).

Donato clearly states he previously challenged his conviction and sentence under § 2255 in March of 1998. (Doc. 14 at 2.) He further states that the district court denied his petition; however, on appeal his sentence was recalculated. (*Id.* at 3.) On September 24, 2006, the petitioner filed a motion for a writ of habeas corpus pursuant to § 2241. (*Id.*) The United States District Court for the Eastern District of New York characterized the filing as a successive § 2255 petition and denied the petition. (*Id.*) The Second Circuit Court of Appeals denied the petitioner's subsequent appeal. (*Id.* at 4.)

The petitioner has indicated to the court that he wishes to proceed pursuant to § 2241. Nevertheless, the petitioner is attacking the conduct of his criminal trial, which must be brought pursuant to § 2255. A review of the petition supports the magistrate judge's finding that the petition constitutes a challenge to his conviction and, therefore, must be brought pursuant to § 2255. Furthermore, the record indicates that petition would be barred from now raising a § 2255 petition.

On December 25, 2012,<sup>2</sup> Donato filed objections to the report and recommendation (Doc. 20). The objections were supplemented by an affidavit (Doc. 21). All of the objections cite to errors in his trial proceedings – the same issues

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<sup>2</sup>This date is the date of mailing.

raised in Donato's § 2241 petition. This court agrees with the magistrate judge that all of Donato's allegations constitute a challenge to his conviction and sentence and therefore such must be brought under § 2255. An appropriate order will be issued.

s/Sylvia H. Rambo  
United States District Judge

Dated: January 18, 2013.

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